

2014

Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms

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Robbie Manhas, *Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms*, 112 MICH. L. REV. 809 (2014).

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NOTE

RESPONDING TO INDEPENDENT JUROR RESEARCH IN THE INTERNET AGE: POSITIVE RULES, NEGATIVE RULES, AND OUTSIDE MECHANISMS

Robbie Manhas*

Independent juror research is an old problem for jury trials. It invites potentially prejudicial, irrelevant, and inaccurate information to guide jury decisionmaking. At the same time, independent juror research compromises our adversarial system by preventing parties from responding to all the evidence under consideration and obfuscating the record on which the jury's decision is made. These threats have only increased in the internet age, where inappropriate sources of information are ubiquitous and where improper access is hard to detect. Nevertheless, courts and parties continue to engage in the same inhibitory measures they have employed for decades. This Note argues for change by providing a new conceptual framework for thinking about and categorizing responses to the problem: positive rules (court rules that channel independent juror research and the impulses that govern it into something productive within our adversarial system), negative rules (court rules designed to eliminate independent juror research and its effects by blocking and punishing access to independent sources of information), and outside mechanisms (the parties' attempts to similarly stamp out this conduct and its effects). After first analyzing the problem of juror research, this Note argues that the old-fashioned system of negative rules and outside mechanisms is an inadequate response to the growing problem. Although this Note offers insight about specific negative rules and outside mechanisms that may continue to be useful in tackling the challenges of independent juror research—for example, by arguing that trials should be prerecorded and videotaped—it ultimately contends that the traditional framework must be supplemented by positive rules, which will promote a more active jury. This Note concludes by endorsing two specific positive rules: allowing the jury to ask questions (of the judge, witnesses, and parties) and providing the jury with an electronic record.

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* J.D. Candidate, May 2014, University of Michigan Law School. I would like to thank Professor Samuel Gross for his assistance with this Note. Thank you also to Johanna Dennehy, Stephen Mayer, Jake Perkowski, and the other members of the Michigan Law Review Notes Office for their helpful comments and suggestions.

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INTRODUCTION

Independent juror research has long been an issue in jury trials.¹ Examples include jurors looking up legal terminology and principles,² investigating details about the parties in their cases,³ and verifying expert testimony or factual information presented at trial through their own inquiries.⁴ The problem has taken new life, both in the academic literature⁵ and in the

1. See, e.g., *Medler v. State ex rel. Dunn*, 26 Ind. 171, 172 (1866) (considering a party's contention that juror misconduct arose because "one or two of the jury, without leave of the court, read and commented upon a part of the charges of the court, and a part of the jury was thus misled and deceived" and because "a part of the jury conversed with persons outside of the court, during an adjournment, and while the case was pending" (internal quotation marks omitted)).

2. See, e.g., *United States v. Kanahale*, 951 F. Supp. 928, 935 (D. Haw. 1996) (describing how a juror "questioned [a] law librarian . . . about search and seizure law" and "subsequently left the library with [a] treatise on the Constitution for a period of about twenty-five minutes").

3. See, e.g., John G. Browning, *When All That Twitters Is Not Told: Dangers of the Online Juror*, 73 TEX. B.J. 216, 217–18 (2010) (describing cases hampered by juror internet misconduct, including one case where "a juror admittedly sent Facebook 'friend' requests to two of the plaintiffs, learned of their 'party animal' ways from their Facebook pages, and emailed plaintiffs' counsel that his client had 'advocated the use of mushrooms and weed smoking, and binge drinking all over the Internet'").

4. See, e.g., *Rocco v. Yates*, No. CV 08-4604-GHK(JTL), 2009 WL 2095991, at *9 (C.D. Cal. July 13, 2009) (explaining that a juror was not able to perform her duty in part because she conducted computer research on the size of a .22, "the same caliber gun involved in the charged crimes").

5. See, e.g., Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial*, 59 DRAKE L. REV. 621 (2011); Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409 (2012); Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579 (2011).

courts⁶ because the internet and portable electronic devices allow jurors to easily and discreetly conduct such research.⁷ In light of the rising tide of independent juror research facilitated by technology, courts need to consider whether the current safeguards against such conduct adequately preserve the integrity of the modern jury trial.

This Note argues that, to address the problem of independent juror research in the internet age, courts should adopt liberalized procedural and evidentiary rules that allow juries to take a more active role in judicial proceedings. Part I explains how, under the current regime, independent juror research is antithetical, and consequently detrimental, to the integrity of trials in our adversarial system. It argues that, given the internet's ubiquity, the problem of juror research has become more pressing than ever before, and it highlights this development by reviewing a recent case and the general response of courts. Part II evaluates these responses and classifies them as "negative rules" (court rules designed to eliminate juror research by blocking access to outside sources or by disincentivizing access to such sources) and "outside mechanisms" (parties' attempts to do the same). It recommends some reforms with regard to negative rules and outside mechanisms (most notably by arguing for prerecorded videotaped trials) but ultimately contends that while such rules and mechanisms are valuable, they are insufficient to adequately quell independent juror research; thus, "positive rules" (court rules that transform the impulse underlying juror research from something that undermines the system into something that undergirds it) are a necessary supplement. Part III endorses a tripartite framework of positive rules, negative rules, and outside mechanisms. It advocates for the implementation of two particular positive rules: allowing jurors to ask

6. See, e.g., *United States v. Lawson*, 677 F.3d 629, 633–34 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 393 (2012) (holding that a juror's misconduct in performing unauthorized research into the definition of an element of a relevant offense on Wikipedia deprived the defendant of his Sixth Amendment right to a fair trial); *Hill v. Gipson*, No. 12-CV-00504-AWI-DLB(HC), 2012 WL 3645337, at *2 (E.D. Cal. Aug. 22, 2012) (reviewing a claim that "a juror did week-end Internet research on the use of cellular telephone records, printed out an article, brought it into the jury room, and discussed it with other jurors").

7. Although this follows from common sense and practical experience, a dearth of robust empirical studies has left the precise scope of the problem unidentified. For one study in the United States, see Hoffmeister, *supra* note 5, at 415 ("Approximately ten percent of the respondents reported personal knowledge of a juror conducting Internet research. In light of the difficulty of detecting this type of juror misconduct, this percentage probably underrepresents the actual number of jurors who use the Internet to research cases." (footnote omitted)). Further, a recent survey of jurors in England found that (1) 12% of jurors in high-profile cases actively looked for information about their cases during trial (compared to 5% in normal cases) and (2) 26% of jurors in high-profile cases saw media reports on the internet during trial (compared to 13% in normal cases). CHERYL THOMAS, MINISTRY OF JUSTICE, ARE JURIES FAIR? 43 (2010), available at <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>. These figures may be understated because, although the jurors surveyed were "guaranteed anonymity . . . it should be borne in mind that they were being asked to admit to doing something they may have remembered being told not to do by the judge." *Id.*

questions of the judge and witnesses and providing jurors with an electronic record.

I. THE PROBLEM OF INDEPENDENT JUROR RESEARCH

Independent juror research is problematic under the current procedural and evidentiary landscape because it undermines the adversarial system. In the model adversarial world, each party advocates its position before an impartial judge or jury, who then renders judgment after weighing the information presented.⁸ Independent juror research upsets this balance in a number of ways, including by potentially exposing jurors to prejudicial, irrelevant, or inaccurate information, often without the knowledge of the judge or the parties.⁹ As a result, some evidence is not subjected to adversarial review, such as cross-examination or rebuttal. Insofar as an adversarial process is essential to producing fair outcomes, perhaps the most important detriment of independent juror research is that both sides lose the opportunity to respond to all the information influencing the jury's determination—which twists our adversarial system into something more akin to the European inquisitorial system.¹⁰ Not only does this compromise the integrity of the jury's decision (because its foundations have not necessarily been subjected to the truth-inducing rigors of the adversarial process),¹¹ but it also obfuscates the record on which the decision is made. In criminal trials in particular, most of these worries are captured by the constitutional concern that independent juror research “violates a defendant's Sixth Amendment rights to an impartial jury, to confront witnesses against him, and to be present at all critical stages of his trial.”¹²

Whether through the internet or other means, independent juror research has always presented these issues. Given that widespread access to the internet now exists, however, the problem has become increasingly significant for the modern jury trial.¹³ And although the way of obtaining information and doing research has changed for jurors, judicial responses to the

8. Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 *CHAP. L. REV.* 57 (1998).

9. See *supra* note 7 and accompanying text.

10. See Franklin Strier, Query, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, 76 *JUDICATURE* 109, 109 (1992) (“Perhaps the most salient feature of inquisitorial trials is the court's obligation to ascertain the truth of the contested matter for itself.”).

11. See *id.* (“Characteristics of the adversary system include . . . a dialectical paradigm for truth-seeking . . .”).

12. *United States v. Dyal*, Cr. No. 3:09-1169-CMC, 2010 WL 2854292, at *12 (D.S.C. July 19, 2010).

13. See *supra* note 7 and accompanying text; see also Daniel William Bell, Note, *Juror Misconduct and the Internet*, 38 *AM. J. CRIM. L.* 81, 83 (2010) (“The number of such incidents [of independent juror research], however, seems to have dramatically increased since the advent of the Internet. While no substitute for empirical research, a cursory glance at Westlaw search results is thought provoking. As of this writing, a search of all state and federal cases for

phenomenon have remained relatively stagnant.¹⁴ Courts typically rely almost exclusively on traditional inhibitory rules, such as mistrials and sequestration, to prevent jurors from relying on information obtained outside of court.¹⁵

Looking at a specific case helps to frame both the importance of the problem the internet represents and the character of judicial responses. In 2012, the Fourth Circuit considered an instance of independent juror internet research in *United States v. Lawson*.¹⁶ There, a jury had convicted Lawson and other defendants of violating the animal fighting prohibition of the Animal Welfare Act for participating in “gamefowl derbies,” or “cockfighting.”¹⁷ The statute in question prohibited, among other things, “sponsor[ing] or exhibit[ing] an animal in an animal fighting venture.”¹⁸ Six days after the jury returned its verdict finding Lawson guilty on all charges, it came to light that a juror had consulted some internet sources, including Wikipedia’s definition of the term “sponsor,” the morning before the jury reached its verdict.¹⁹ Further, the same juror brought a printout of the Wikipedia entry to the jury room during deliberations.²⁰ All of this conduct occurred despite the explicit instructions of the district court, “which had admonished the jurors not to conduct any outside research about the case, including research on the internet.”²¹ Although the district court had denied Lawson’s motion for a new trial, the Fourth Circuit found that the government had failed “to rebut the presumption of prejudice” that arose from the juror’s actions. It thus vacated the appellants’ convictions under the animal fighting statute and awarded them a new trial.²²

This is just one recent example of how independent juror internet research has created lengthy, costly litigation, spanning both an appeal and a remand.²³ This case also highlights the rather limited nature of judicial

the term ‘juror misconduct’ yields 2701 results for the years 1980–1990, 3990 results for the years 1990–2000, and 8755 results for the years 2000–2010.”).

14. Of the few innovations by courts, prohibiting electronic devices and improved jury instructions are the most notable. See *infra* Sections II.A.1 and II.A.4, respectively.

15. See, e.g., *Russo v. Takata Corp.*, 774 N.W.2d 441, 443–44 (S.D. 2009) (declaring a mistrial because a juror conducted internet research).

16. 677 F.3d 629 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 393 (2012).

17. *Lawson*, 677 F.3d at 633 (internal quotation marks omitted).

18. *Id.* (alterations in original) (quoting 7 U.S.C. § 2156(a)(1)) (internal quotation marks omitted).

19. *Id.* at 639.

20. *Id.*

21. *Id.* at 640.

22. *Id.* at 639, 651.

23. For other examples, see Brian Grow, *As Jurors Go Online, U.S. Trials Go off Track*, REUTERS (Dec. 8, 2010, 3:23 PM), <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>, and John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping up*, N.Y. TIMES, Mar. 18, 2009, at A1, available at http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all&_r=0.

responses to the problem: one notable before-the-fact protection—jury instructions prohibiting outside research—and one after-the-fact protection—declaring a mistrial and ordering a new trial. It is true that courts have been known to adopt a few other before-the-fact safeguards, such as prohibiting the use of electronic devices in the courthouse,²⁴ sequestering the jury,²⁵ and fining jurors or holding them in contempt of court.²⁶ Parties may also eliminate jurors they suspect will conduct internet research through voir dire.²⁷ But all these protections are predominately negative (in that they punish or deprive jurors of access to sources of information) and seem to inhibit juror activity and agency generally.²⁸

Given the balance that must be achieved for a fair trial, these responses are undoubtedly necessary in some measure. But imagine how much trouble could have been avoided if, for example, Lawson had simply been allowed to ask the parties or the court for clarification on the definition of “sponsor.” As Professor Morrison has pointed out, some of the constraints on jurors “reflect the modern conception of impartiality, which is frequently confused with ignorance and passivity. . . . Internet access has given juries a means, albeit an unauthorized one, of sending a signal that they are chafing under the restrictions of their role.”²⁹ The question that arises, then, is how to alleviate this chafing without sacrificing the virtues of the adversarial system. Part II articulates a formal framework of how courts and parties can do so and suggests ways in which the court system could improve these measures to better address the problems that independent juror internet research raises.

II. A FRAMEWORK THAT BOTH CURBS AND ACCOMMODATES THE RESEARCH IMPULSE

Responses to the problem of juror internet research typically take two forms: (1) “negative rules,” or court rules designed to eliminate juror research and its effects by blocking access to outside sources or disincentivizing access to such sources, and (2) “outside mechanisms,” or actions taken by the parties to remove or ameliorate the possibility of independent juror

24. See, e.g., MICH. CT. R. 2.511(H)(2)(c), available at <http://courts.mi.gov/Courts/MichiganSupremeCourt/CurrentCourtRules/1Chapter2CivilProcedure.pdf> (forbidding use generally, but permitting use “during breaks or recesses but . . . not . . . to obtain or disclose information”).

25. See *infra* Section II.A.2.

26. See *infra* Section II.A.5.

27. See *infra* Section II.B.1.

28. By this I mean that the measures stifle juror interest and investment in the trial. See Morrison, *supra* note 5, at 1582 (“[T]he jury’s role has been reduced to that of an adding machine, mechanically crunching the carefully screened evidence that is funneled into it, and producing a verdict.”).

29. *Id.*

research influencing the jury's decision. An example of the former is forbidding the use of electronic devices in the courthouse;³⁰ an example of the latter is removing likely offenders from the juror pool through voir dire.³¹ In addition to negative rules and outside mechanisms, there is theoretically a third response, one which has been unduly neglected: "positive rules," or court rules that channel jury activity, as well as the impulses that drive independent juror research, into something productive in our adversarial system.

This Part contends that the court system must adopt a tripartite framework of positive rules, negative rules, and outside mechanisms if it is to satisfactorily address the problem of juror internet research. This Part first assesses the merits of specific examples of both negative rules (Section II.A) and outside mechanisms (Section II.B) and offers recommendations in these areas, such as implementing more prerecorded videotaped trials. Section II.C concludes that negative rules and outside mechanisms serve a valuable purpose, but they cannot by themselves adequately solve the problem of independent juror research. Thus, courts should also employ positive rules as a supplement.

A. *Negative Rules*

Negative rules are court rules that attempt to eliminate juror research from affecting juror decisionmaking, typically either by restricting access to sources of independent research (e.g., the internet and electronic devices) or by punishing or otherwise disincentivizing jurors who attempt to access such sources. These rules are essential to ensuring a fair jury trial because even if jurors should be allowed a more flexible, informed role, unfettered access to information would invariably expose jurors to impermissibly prejudicial or otherwise inappropriate sources. Nevertheless, negative rules cannot by themselves answer the problem of internet research: it is so easy to access the internet and hard to monitor that access that nothing short of intolerably onerous and expensive measures can completely stem the tide. Furthermore, negative rules' narrow focus on access ignores the intent and purpose that cause jurors to go beyond the confines of court—elements that are just as important as access in diagnosing and treating the problem. The following examples illustrate both the virtues and vices of negative rules.

1. Forbidding Electronic Devices

To prevent jurors from conducting independent research and using social media during trial, courts are increasingly forbidding the use of electronic devices in the courthouse, at least during trial or deliberation.³² This is a sensible rule; we do not, for example, want jurors looking up a defendant's criminal record while he is on the stand or tweeting their thoughts on

30. See *infra* Section II.A.1.

31. See *infra* Section II.B.1.

32. Bell, *supra* note 13, at 86–87.

the deliberations. Even so, like most negative rules, forbidding the use of electronic devices is an incomplete solution. Although such a rule may prevent jurors from using electronic devices in the courthouse, in some jurisdictions, jurors can use them during breaks.³³ Moreover, jurors can always use electronic devices before they arrive and can also use them after they depart, which is problematic when trials last longer than a day.³⁴

This problem could be avoided with shorter trials. One suggestion for how to reasonably shorten trials is by conducting prerecorded videotaped trials, discussed in Section II.A.3. Without shortening trials, however, forbidding electronic devices leaves jurors with many opportunities to do their own research anyway. For this reason, forbidding electronic devices can be seen as a less effective (and less burdensome) version of sequestration, discussed next.

2. Sequestration

Some courts also sequester jurors to prevent them from conducting independent research or otherwise being prejudiced. Sequestration is the ultimate negative rule, in that exposure to outside information and use of electronics tend to be so closely monitored and regulated that accessing the internet for outside research is effectively blocked.³⁵ Yet sequestration is hardly a practical or desirable option in all but the most high-profile cases. First, sequestration of a jury, like declaring a mistrial, is expensive.³⁶ Further, it places a large burden on jurors, as they are effectively under a form of arrest for the duration of the trial.³⁷ Most importantly, while sequestration is

33. See, e.g., MICH. CT. R. 2.511(H)(2)(c), available at <http://courts.mi.gov/Courts/MichiganSupremeCourt/CurrentCourtRules/1Chapter2CivilProcedure.pdf>.

34. See Bell, *supra* note 13, at 87 (“[E]ven if jurors were not allowed to use electronic devices during breaks, *at-home* Internet use would remain unrestricted unless the jury were sequestered.”). This is especially problematic given that most trials *do* last longer than a day. See, e.g., *Frequently Asked Questions*, DUPAGE COUNTY JURY COMMISSION, <http://ejury.dupageco.org/main.asp?id=faq> (last visited Oct. 12, 2013) (explaining that in DuPage County, Illinois, “[t]he average trial is 2 to 3 days”).

35. See, e.g., Kathy Matheson, *For 12 Jurors Deliberating Jerry Sandusky Child Sex Abuse Case, No TV, Twitter or Technology*, YAHOO! NEWS (June 22, 2012, 2:30 PM), <http://news.yahoo.com/12-jurors-deliberating-jerry-sandusky-child-sex-abuse-183033072.html> (“[F]or the jurors in the Jerry Sandusky case, t]here’s no Twitter, Facebook or radio. Smartphones, iPads or laptops? No way. And the phones and televisions were removed from their hotel rooms.”); Jeff Weiner, *Casey Anthony Jurors: What Life Was Like for 17 Sequestered in Murder Trial*, ORLANDO SENTINEL, July 10, 2011, available at http://articles.orlandosentinel.com/2011-07-09/news/os-casey-anthony-jurors-lifestyle-20110709_1_casey-anthony-jurors-murder-trial-karen-levey (“The jurors lived under the watchful eye of Orange County deputies, who monitored them and transported them everywhere they went. They watched them as jurors made calls, used the Web and met with family. . . . [T]he jurors were allowed to have cell phones, but they were kept in the custody of deputies, who monitored phone calls as well as the limited internet access jurors were allowed.”).

36. Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 105–06 (1996).

37. *Id.* at 106–09 (describing the psychological harms of sequestration, including a recounting of the experiences of one previously sequestered juror who had felt “like a prisoner”

unquestionably effective, as discussed below, relying solely on this effectiveness reveals the myopia of a system of negative rules bereft of complementary positive rules.

The fundamental problem, which lacks proper emphasis in the current scholarship, is that negative rules like sequestration only address means of accessing information, not the purposeful attitude of jurors that makes such access so dangerous. Cell phones and computers are primarily worrisome not because jurors might just happen to stumble upon prejudicial information while browsing on them, but because jurors who intend to answer certain questions or do further research will purposefully use these devices to accomplish those ends. Sequestration is unique among negative rules, in that it theoretically overcomes this problem by blocking access so completely that the intent of jurors is immaterial (they simply will not have the resources to act on their intent). But the value of this effectiveness is undercut by the fact that sequestration is harsh and expensive in most cases, making it unpopular and infeasible except in cases that receive an inordinate amount of media coverage.³⁸ Aside from these rare cases, blocking access in the internet age is not entirely possible and not quite enough: the purposeful attitude of jurors is what ultimately needs to be addressed.

That said, given sequestration's undeniable effectiveness, efforts should be made to expand its reach, if the court system can effectuate such an expansion in a palatable manner. In particular, the signature defects of sequestration, namely the burdens it puts on jurors and the expense it imposes on courts, can be remedied by shortening trials. One road toward shortening trials is prerecorded videotaped trials, the subject of the next Section.

3. Prerecorded Videotaped Trials

Prerecorded videotaped trials ("PRVTTs") are trials "in which all of the testimony is prerecorded on videotape so that the judge can edit it before he shows it to a jury."³⁹ One could classify PRVTTs as a negative rule if they foreclose opportunities for jurors to conduct independent research. However, they have never been advocated as a negative rule *per se*; instead of arguing for PRVTTs' ability to eliminate juror research, advocates of the method emphasize more generally that it economizes time (allowing a trial to be conducted in one-half to one-third of its normal duration) and eliminates the possibility of a mistrial (as the judge can edit out inadmissible

(quoting Mark Katches, *Manson Jurors Know What Simpson Panel Is in for*, L.A. DAILY NEWS, Jan. 15, 1995, at N1) (internal quotation marks omitted)).

38. See Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2709 (1996) (noting that longer trials have made jury sequestration rarer today, even while "[c]hanges in press coverage of criminal proceedings have . . . enlarged opportunities for inappropriate behavior by jurors during trials").

39. James L. McCrystal, *Videotaped Trials: A Primer*, 61 JUDICATURE 250, 251 (1978).

comments, questions, and answers).⁴⁰ Nevertheless, considering how PRVTTs multiply the benefits of other negative rules while concomitantly reducing their burdens strengthens the argument for PRVTTs.

The reason for this is simple. Negative rules targeting independent juror research endeavor to block access to the internet, but they tend to come in two inadequate strains: (1) those that are arguably effective but exorbitant (e.g., sequestration)⁴¹ and (2) those that are inexpensive but easily circumvented (e.g., forbidding electronic devices in the courthouse).⁴² Ultimately, the length of unrecorded trials causes both forms of deficiency. Sequestration, for example, is burdensome because trials can take weeks or more, forcing courts to upset the jurors' normal lives for significant periods of time.⁴³ Likewise, forbidding electronic devices in a courthouse is ineffective if trials take more than a day because then there are interstitial periods where jurors go home and have access to electronic devices. But PRVTTs go a long way toward curing the problem of time. And thus they have the potential in many cases to make sequestering jurors more manageable and forbidding electronic devices more effective.⁴⁴ If more trials last only one day, forbidding electronic devices becomes a powerful tool in curbing the influence of internet research in our judicial system;⁴⁵ if trials are shorter generally, sequestration becomes a feasible option in a broader range of cases.

People first suggested PRVTTs in the 1970s, and despite their clear benefits and the encouraging reception by parties in cases in which they have

40. *Id.* at 253–54; *see also* Charles E. Stiver, Jr., Note, *Video-Tape Trials: A Practical Evaluation and a Legal Analysis*, 26 *STAN. L. REV.* 619, 621, 633–34 (1974) (noting that videotape “simplif[ies] retrial after mistrials” and that “out-of-court review of objections saves time [during trials]”).

41. *See supra* Section II.A.2.

42. *See supra* Section II.A.1.

43. *See, e.g.*, Jennifer Mascia, *Can You Hear Justice Now?*, *AM. PROSPECT* (July 8, 2011), <http://www.prospect.org/article/can-you-hear-justice-now> (“The jurors and alternates in the Anthony case were chosen in Clearwater, Florida, and shipped 100 miles east to Orlando, where they lived in a hotel for 43 days . . .”).

44. One commentator has already considered reducing the time jurors are sequestered to make sequestration less burdensome. Strauss, *supra* note 36, at 118. However, Strauss dismisses this idea as unworkable because she only considers the imposition of time limits, which would be arbitrary. *Id.* (“[H]ow is the time period [for sequestration] to be set and, perhaps even more importantly, enforced? . . . [H]ow do we even begin to pick an appropriate period? And what happens if the trial goes longer than that time? Obviously, the judge cannot simply end the trial at an arbitrary point and time predictions are notoriously inaccurate.”). As advocated above, the light at the end of this tunnel of reasoning is to focus on time minimization instead of time limitation. Rather than creating artificial limits on how much time juries can be sequestered, courts can naturally minimize the time period of sequestration by reducing the length of trials—and PRVTTs are a way of potentially doing so.

45. And there is some reason to believe that PRVTTs could render some trials day-long affairs. *See, e.g.*, Diane M. Hartmus, *Videotrials*, 23 *OHIO N.U. L. REV.* 1, 3 (1996) (“The first videotrial took place in 1971 The case . . . was a civil tort case A jury heard live opening statements, viewed a two-and-one-half hour videotape of testimony, heard live closing statements and viewed prerecorded instructions from the judge in the course of a day. The entire trial, including jury selection and deliberation, took only one day.” (footnote omitted)).

been used, they have never quite taken root.⁴⁶ Some objections to PRVTTs are technical,⁴⁷ but the main worry, at least ostensibly,⁴⁸ is that “too much is lost in translation from live to recorded testimony.”⁴⁹ This concern, however, becomes less compelling as technology becomes more sophisticated and we as a culture become more accustomed to processing information via videotape.⁵⁰ This is not to speculate as to where technology may take us but only to point out that courtroom technology is already significantly better today than it was in the 1970s and will likely continue to improve.⁵¹ Recorded testimony has the potential to be more real and interactive than ever before,⁵² and if courts are going to successfully tackle problems born in the wake of modern technology, such as independent juror internet research, they should adopt such technology for their own ends.

Further, even assuming that some gap would remain between live and recorded testimony, it is, despite conventional wisdom and the declarations of appellate courts, not clear that the opportunity to observe the demeanor of testifying witnesses helps in evaluating their credibility. In fact, at least some evidence indicates the opposite.⁵³ Given the questionable value of direct observation, the increasing quality of recording technology, and how

46. RICHARD O. LEMPET ET AL., *A MODERN APPROACH TO EVIDENCE* 1269 (4th ed. 2011).

47. *Id.* at 1269–70.

48. An unspoken, but more likely, explanation for the attitude against PRVTTs is that attorneys are against change, especially when that change “limits the tactical moves that [they] can make.” *Id.* at 1270. “Under this system, jurors do not hear—and therefore cannot be influenced by—objections, excluded testimony, arguments on points of law, and the like.” *Id.*

49. *Id.*

50. See Hartmus, *supra* note 45, at 3 (“[In comparison to when PRVTTs were first introduced,] video technology has improved significantly, and use is common. Most people are very accustomed to viewing videotapes today, be it a rented movie or Uncle Fred’s tape of the annual family reunion. Video has become an everyday part of our lives.”).

51. See, e.g., Patrick Michael, *Technology in the Courtroom*, L. TECH. TODAY (July 9, 2013), <http://www.lawtechnologytoday.org/2013/07/technology-in-the-courtroom/> (describing how Kentucky’s Jefferson County Circuit Court has installed a high-tech AV system); see also Fredric I. Lederer, *Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1099–100 (1994) (describing technological developments in courtrooms, including “[r]emote two-way television arraignment and witness examination,” “[r]ecorded or real-time televised evidence display,” “[b]uilt-in video deposition playback facilities,” “microchip-controlled, multi-camera, multi-frame, video recording of proceedings . . . [with] optional synchronization to the real-time transcript,” and more); Henry H. Perritt, Jr., *Video Depositions, Transcripts and Trials*, 43 EMORY L.J. 1071, 1091 (1994) (“The technology exists to integrate video recordings with desktop computer based script management. . . . [D]esktop computer multimedia tools can obviate some of the problems associated with videotape.”).

52. See, e.g., Britney Fitzgerald, *MIT’s New Video Technology Could Give You Superhuman Sight*, HUFFINGTON POST (June 4, 2012, 6:33 PM), http://www.huffingtonpost.com/2012/06/04/eulerian-video-magnification-video-technology_n_1568956.html; Aaron Saenz, *3D Hologram Prints Invade Military, Commercial Design*, SINGULARITYHUB (Dec. 16, 2010, 4:40 PM), <http://singularityhub.com/2010/12/16/3d-hologram-prints-invade-military-commercial-design-videos/>.

53. Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1078–91 (1991). For example, people probably overestimate the probative value of physical cues when someone else

the widespread use of PRVTTs would improve negative rules like sequestering jurors and forbidding electronic devices, courts should seriously consider recording trials as a supplementary negative rule. But this rule is not a cure-all; even if it is adopted in all cases, it cannot help block internet access in trials that are so long that juror participation spans multiple days notwithstanding that the proceedings are abbreviated by a well-edited recording.

4. Jury Instructions

Other courts have responded to increasing internet usage by adopting more detailed jury instructions, in the hopes that this will better alert jurors to the dangers of improper internet activity.⁵⁴ For example, in November 2010, Arizona's Civil Jury Instructions Committee approved a revision of its civil jury instructions, including significant discussion of internet issues in its admonition against independent juror research.⁵⁵

The relevant rule in Arizona's preliminary criminal instructions, last updated in 2013, features an elaborate discussion of juror internet use:

Each of you has gained knowledge and information from the experiences you have had prior to this trial. Once this trial has begun you are to determine the facts of this case only from the evidence that is presented in this courtroom. Arizona law prohibits a juror from receiving evidence not properly admitted at trial. Therefore, *do not do any research or make any investigation about the case on your own*. Do not view or visit the locations where the events of the case took place. *Do not consult any source such as a newspaper, a dictionary, a reference manual, television, radio or the Internet for information*. If you have a question or need additional information, submit your request *in writing* and I will discuss it with the attorneys.

Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. *This prohibition about not discussing the case includes using e-mail, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, I-Phones, I-Touches, Google, Yahoo, or any internet search engine, or any other form of electronic communication for any purpose whatsoever, if it relates in any way to this case. This includes, but is not limited to, blogging about the case or your experience as a juror on this case, discussing the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony or exhibits or any aspect of the case or your courtroom experience with anyone*

is speaking: practiced liars can fake the signals of truth-telling, but honest witnesses may be nervous when questioned and thus may give signals that are read as indicative of dishonesty. Removing these cues from the honesty analysis (for example, by reading a transcript) instead focuses one on the content of what is being said, which is not as susceptible to such misinterpretation.

54. Bell, *supra* note 13, at 89–91.

55. STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) 11–12 (5th ed. 2013) (Preliminary Instruction 9). Unfortunately, this revision has not yet been submitted to the Board of Governors for approval. *Id.* at 11.

whatsoever, until the trial has ended, and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you cannot talk about the trial until it is over.

One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.

If you have cell phones, laptops or other communication devices, please turn them off and do not turn them on while in the courtroom. You may use them only during breaks, so long as you do not use them to communicate about any matter having to do with the case. You are not permitted to take notes with laptops, Blackberries, tape recorders or any other electronic device. You are only permitted to take notes on the notepad provided by the court. Devices that can take pictures are prohibited and may not be used for any purpose.⁵⁶

Reformed jury instructions are a step in the right direction. This is true even though some question the wisdom of alerting jurors to the many avenues of research available to them.⁵⁷ First, this worry may underestimate just how pervasive internet usage is independent of any hints from the judiciary. Second, and more important, specifying potential violations is probably worthwhile because there is evidence that jurors would not realize that certain activities, such as Googling a term, constitute “research.”⁵⁸ And third, jurors need to understand *why* such conduct is prohibited. Pronouncements from on high are not nearly as powerful as conscientious explanations that

56. STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL 6–7 (3d ed. 2013) (emphases added) (Preliminary Instruction 13).

57. The worry being that specifying all the various websites and electronic devices that can be abused will only highlight their existence to jurors and thus encourage such abuse. Daniel A. Ross, *Juror Abuse of the Internet*, N.Y. L.J., Sept. 8, 2009, at S4.

58. Dennis M. Sweeney, Address to the Litigation Section of the Maryland State Bar Association: The Internet, Social Media and Jury Trials: Lessons Learned from the Dixon Trial 3 (Apr. 29, 2010) (transcript available at <http://juries.typepad.com/files/judge-sweeney.doc>) (“Maryland’s Court of Special Appeals, in an unreported opinion, overturned a felony-murder conviction because a deliberating juror conducted an on-line search for the terms ‘livor mortis’ and ‘algor mortis’ on Wikipedia, printed out the pages, and brought them in to the jury room. . . . When asked about it, the juror said, ‘To me that wasn’t research. It was a definition.’”). Note also the analogy to acts of prohibited juror communication, which juror expert Paula Hannaford-Agor explains are often mistakes: “For some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication.” Paula Hannaford-Agor, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, CT. MANAGER, Summer 2009, at 42, 43.

treat jurors with respect as intelligent individuals.⁵⁹ Since no number of admonishments can prevent jurors from using the internet if they really want to, courts are better off appealing to their reason. Arizona's criminal jury instructions only briefly touch on such an explanation, but this should be the core of any such instruction.

5. Reporting Offending Behavior

Some jury instructions encourage jurors to report any instances of independent research that come to their attention, as courts cannot prevent what they do not perceive. This is a negative rule that, like declaring a mistrial, is remedial, not preemptive. It complements explaining to jurors why independent research can be so detrimental to the process: if we can convince at least some jurors of the harm independent research causes, they will be more likely to inform the judge if a breakdown occurs.⁶⁰ Furthermore, encouraging such reports may deter those who would otherwise research, or at least deter them from revealing the results of their research to other jurors (and thus prevent total contamination of the jury). The Judicial Conference Committee on Court Administration and Case Management has adopted this rule in its new model jury instructions.⁶¹

The question that arises, of course, is what to do once a juror reports a violation. One option is to admonish, but not actually discipline, violators in the hopes of securing their cooperation;⁶² another is to exclude violators

59. See Ellen Brickman et al., *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 297 (2008) ("Judges can acknowledge the temptations of Internet research, but then can explain to jurors *why* their cooperation in refraining from extrinsic research is so vitally important to the fairness of the judicial system. . . . An understanding of why this rule is not arbitrary should enhance jurors' commitment to adhering to it."); Elizabeth F. Loftus & Douglas Leber, *Do Jurors Talk?*, TRIAL, Jan. 1986, at 59, 60 (suggesting, in the context of prohibitions on juror discussions, that judges should explain the reasoning behind orders to increase juror adherence).

60. According to at least one study, asking jurors to report misbehavior is perhaps the single most effective means of detection. See MEGHAN DUNN, FED. JUDICIAL CTR., JURORS' USE OF SOCIAL MEDIA DURING TRIALS AND DELIBERATIONS 4 (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/\\$file/dunnjuror.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf) ("Judges acknowledge that it is difficult to detect jurors' inappropriate use of social media. Of the 28 judges who indicated how they learned of the incident, most said another juror had reported it (13 judges).").

61. JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE 1 (2012), available at <http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf> ("I expect you will inform me as soon as you become aware of another juror's violation of these instructions.").

62. Although, while courts have acted leniently in some instances of juror internet usage, when it comes to independent juror research on the internet, court reactions tend to be more severe. See generally Michael K. Kiernan & Samuel E. Cooley, *Juror Misconduct in the Age of Social Networking*, 62 FDCC Q. 179, 184–89 (2012) (describing court reactions in various instances of juror internet usage).

from participating in deliberations.⁶³ A third option is to punish them if they violate the prohibition on independent jury research.⁶⁴

This third option might be seen as controversial: Does the benefit such a rule confers outweigh the risk of deterring people from serving on juries?⁶⁵ It does not seem unreasonable to hold jurors accountable for violations of rules on internet research. This is true as long as two conditions are met: (1) courts implement positive rules that allow jurors to exercise their curiosity in ways that work productively within the system and (2) the judicial response is tailored to the violation (i.e., a judge has the sound discretion whether to admonish, remove, or punish). Insofar as courts disincentivize internet research as much as possible through positive rules, and judges give jury instructions in sufficient detail so that jurors understand that a ban on research is far from arbitrary, a contempt rule of this sort would be an even-handed disincentive to doing internet research.

6. Mistrial

Declaring a mistrial is more than a remedy for a violation of the prohibition on independent juror research; it is also a negative rule, in that it disincentivizes outside research by eliminating the possibility that such research will affect the ultimate disposition of a case. In keeping with mistrial's dual nature as a remedy, however, it is a negative rule of last resort. At least two good reasons support its classification as a nuclear option. First, holding a new trial is expensive (with regard to both time and money).⁶⁶ Second, and perhaps more important, the move is remedial, as opposed to preventative—nothing in declaring a mistrial ensures that a new trial will not be

63. *E.g.*, *Moore v. Am. Family Mut. Ins. Co.*, 576 F.3d 781, 787 (8th Cir. 2009) (“After the case was submitted to the jury, one of the jurors did some research on the internet and determined what American Family’s profits had been in the past year. The district judge then excused the juror from further participation”); *United States v. Bristol-Mártir*, 570 F.3d 29, 37–38 (1st Cir. 2009) (describing how a juror who did internet research was replaced with an alternate).

64. *E.g.*, Annmarie Timmins, *Juror Behind Mistrial Pleads, Pays \$1,200*, CONCORD MONITOR (Oct. 10, 2009), <http://www.concordmonitor.com/article/juror-behind-mistrial-pleads-pays-1200> (describing a case where the offending juror had to pay a \$1,200 fine for causing a mistrial by revealing that the defendant was a convicted child molester); Ed White, *Juror Hadley Jons Punished for Posting Verdict on Facebook*, HUFFINGTON POST (Sept. 2, 2010, 9:44 AM), http://www.huffingtonpost.com/2010/09/02/hadley-jons-juror-punished_n_703877.html (describing a Michigan case where the offending juror had to write a five-page essay about the constitutional right to a fair trial and pay a \$250 fine after posting the verdict on Facebook).

65. Bell, *supra* note 13, at 94 (“[I]t is generally inadvisable to punish jurors who conduct outside research. . . . [T]he prospect of punishment is likely to discourage people from jury service altogether.”).

66. Amanda McGee, Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 302 (2010).

contaminated by similar misconduct.⁶⁷ Although declaring a mistrial is necessary when other negative rules have failed, our system should ideally be able to depend on other rules eliminating and channeling juror action so that mistrials are kept to a minimum. This notion reinforces the need for positive rules: all the examples of mistrials mentioned in this Note resulted from a breakdown of negative rules and outside mechanisms (e.g., offending jurors were not eliminated during voir dire and subsequently ignored jury instructions prohibiting them from internet research).⁶⁸

B. *Outside Mechanisms*

Courts should not and do not bear the burden of dealing with the problem of independent juror research by themselves. Outside mechanisms, like negative rules, are actions meant to eliminate such research and its effects. Unlike negative rules, however, outside mechanisms are a product of parties, not courts. Extensive discussion of these mechanisms is unnecessary, as reviewing a couple of examples will demonstrate that they are limited in the same way as negative rules or any other inhibitory measures: they are preventative but ultimately unable either to completely block access to research or to inhibit the inclination to research in the first place.

1. Eliminating Likely Offenders Through Voir Dire

The most obvious way that parties step in is by eliminating likely offenders through voir dire. For example, one might hypothesize that there are telltale signs, such as a strong social media presence and a high rate of internet and electronics use, that a particular person would use the internet for improper ends. In fact, many attorneys already look into jurors' digital or internet "footprints"—by, for example, running Google searches of their own and looking at social networking sites and databases—and "courts and state bar associations have both approved and encouraged the practice."⁶⁹ This theoretically allows parties to preempt instances of juror misconduct by eliminating veniremembers, and it also highlights to judges and litigants how much they have to stress the importance of not violating the prohibition against independent juror research to those who are eventually chosen. On the other hand, there may be concerns about juror privacy, and even the

67. Bell, *supra* note 13, at 86. One might counter that while there is no guarantee (or even extra protection afforded) against contamination in the new trial, it is unlikely to be repeated simply on the (im)probability of the same event occurring twice. The strength of this point depends on how common juror research is in the first place—although mistrials (and detecting juror research) may be rare events, this does not mean that juror research itself is rare, and thus an additional trial may not be enough to guard against its occurrence.

68. *E.g.*, Russo v. Takata Corp., 774 N.W.2d 441, 444 (S.D. 2009) (declaring a mistrial because a juror conducted internet research upon receiving his summons, either ignoring or misunderstanding the instructions therein prohibiting outside research, and this fact did not come to light until after the verdict was rendered because attorneys handling the case did not directly raise the topic during voir dire).

69. Hoffmeister, *supra* note 5, at 442–43 (footnote omitted).

best vetting process will miss some future offenders (especially since attorneys may choose not to eliminate a juror whose internet usage may be an advantage).⁷⁰ One could also question whether “internet presence” really tracks a propensity to break rules; just because one is more familiar with the internet does not mean that one is more likely to abuse it. More important, like most negative rules (and unlike positive rules), elimination through voir dire does not address *why* some people break the rules.⁷¹

2. Dealing with the Immediate Universe of Internet Information

Practitioners might also (and presumably do) confront the fact that, unless sequestration occurs, jurors always have the potential to conduct some amount of internet research. If so, they need to be aware of the universe of information that is available on the internet and consider whether it is possible to tailor their arguments, questioning of witnesses, and interactions with the jury in a way that assuages jurors prejudiced by information on the web. Of course, this ultimately comes down to the context of the specific case at hand, and in many instances, it may be impossible to adequately immunize a trial and its outcome from damaging information available on the internet (such as if the client has an extensive criminal record). Thus, although being responsive to information on the internet is an outside mechanism built into any competent lawyering, it cannot sufficiently respond to the problem of independent juror research.

C. *The Need for Positive Rules: Negative Rules and Outside Mechanisms Are Insufficient*

The corrupting dynamic between juror research and the adversarial system described in Part I is not inherent. Rather, it is a function of the particular procedural and evidentiary rules that our system does and does not adopt. Because courts are loath to implement reforms that would allow the jury to become more active,⁷² jury research and all that comes with it (that is, juror independence) have been seen as anathema, and all rules spawned to deal with the problem have focused on eliminating the conduct. From this reactionary instinct, courts and parties have developed negative rules and outside mechanisms of the sort analyzed in this Part.

Although this may have been a viable response in a different era, its focus is clearly misguided in the internet age. This is because blocking access targets only a necessary condition (the availability of means) rather than the root cause (the intent to carry out) of independent juror internet research. Unfortunately, the necessary condition of access is increasingly easy to satisfy, despite courts’ efforts to block access with negative rules—such that

70. *Id.* at 444.

71. *Id.*

72. *See, e.g., id.* at 415 (“[T]he topic of allowing jurors to ask questions of witnesses . . . was met with disapproval by most Jury Survey respondents.”).

even if courts were willing to engage in an ever-escalating war against technological advancement, they would be fighting a losing battle. As explained above, although inhibitory steps are necessary, they are ultimately insufficient: the internet's ease-of-access to information and the jury's ease-of-access to the internet cannot be overcome by anything short of prohibitively expensive and draconian measures, such as sequestration of the jury, which are (rightly) implemented infrequently.⁷³ Thus, a large amount of juror research invariably goes unprevented and undetected.⁷⁴

It is true that developing more effective negative rules and outside mechanisms can help alleviate this problem; this Part, for example, has specifically recommended utilizing PRVTTs and instituting other reforms that reduce the length of trials as a way of multiplying the effectiveness of negative rules such as sequestering the jury and forbidding electronic devices.⁷⁵ But if the pervasive presence of undetected juror research is deemed to seriously undermine the integrity of jury trials, the clear upshot of the impossibility of fully blocking access is that the impulse motivating jurors to conduct research must be accommodated. Theoretically, we could integrate jury research, or at least some of its main drivers, into our legal system without stripping the system of its adversarial character. Juror research would no longer undercut the adversarial system but would undergird it—and would in fact illuminate the jury's decisionmaking process.

Specifically, the problem presented by juror research can be solved by a framework consisting of positive rules, negative rules, and outside mechanisms. Positive rules are court rules that harness the intent that jurors act on when engaging in independent research by slotting those jurors into our adversarial system in a systematic fashion. A relatively uncontroversial example would be to allow jurors to ask questions during trial (although this Note makes the more radical suggestion of allowing jurors to pose questions to the parties themselves, instead of just to witnesses⁷⁶). A less explored, and presumably more contentious, positive rule would be to allow jurors access to an online record. Both examples channel juror activity in a way that quells the desire to go outside the system to get information. In doing so, positive rules avoid juror prejudice and other detriments of independent research writ large.

Ultimately, this means that we must allow juries to become more active. This is not to say that negative rules and outside mechanisms are per se flawed. In general, negative rules and outside mechanisms serve an integral function in this proposed framework: they act as lassos that corral juror conduct, blocking prejudicial and otherwise undesirable juror behavior while allowing positive rules to step in and channel what is left into a useful, truth-promoting activity. Negative rules and outside mechanisms, at their

73. Strauss, *supra* note 36, at 68.

74. See Bell, *supra* note 13, at 86 n.38.

75. *Supra* Section II.A.1 (electronic devices), II.A.2 (sequestration).

76. *Infra* Section III.A.

best, are not blunt instruments designed to stamp out any and all independent juror action. Rather, they are carefully tailored devices that shepherd independent juror conduct either into or out of the courtroom, depending on its appropriateness. But unhelpful juror activity cannot be stymied completely, and we must allow positive rules to pick up the slack. Part III argues in favor of two specific positive rules and against one to demonstrate in concrete terms how the court system might accomplish this.

III. EVALUATING THE MERITS OF SPECIFIC POSITIVE RULES

There are a number of plausible impulses driving any given juror to conduct independent research, including a desire to be actively involved,⁷⁷ a desire to remedy confusion about a legal term or piece of evidence,⁷⁸ and a desire to learn or promote the truth.⁷⁹ It is the job of negative rules and outside mechanisms to limit these impulses, or at least the behavior they motivate, when they are likely to lead to impermissible results, such as prejudicing the jury. As elaborated in Part II, however, some slippage is unavoidable. Further, these impulses can in fact be beneficial in our adversarial system if courts use proper positive rules to harness them in a way that is legally productive. Part III suggests that courts adopt at least two specific positive rules: (1) allowing jurors to ask questions of the witnesses and parties at trial (Section III.A) and (2) allowing jurors independent access to an electronic record of trial transcripts and other evidence (Section III.B).

A. Allowing Jurors to Ask Questions

Although it has received only cursory mention in the literature as a way to combat independent juror research,⁸⁰ one reform that some courts are nonetheless beginning to implement is allowing jurors to ask questions.⁸¹ Academics and judges alike have mostly clamored for this change on grounds other than preventing juror research: questions ensure that jurors are active, engaged decisionmakers,⁸² provide insight into the jury's

77. See Caren Myers Morrison, *Can the Jury Trial Survive Google?*, CRIM. JUST., Winter 2011, at 4, 14.

78. See *Tapanes v. State*, 43 So. 3d 159, 162 (Fla. Dist. Ct. App. 2010) (describing how a juror looked up the definition of the word "prudent" on his smartphone and shared this information with other jurors).

79. See Timmins, *supra* note 64 ("Paul Christiansen of Danbury revealed Timothy Townsend's prior conviction during the second day of deliberations on new child sexual assault charges, according to court records. He said afterward that he had no regrets because he believed jurors need to know about Townsend's past.").

80. See, e.g., Morrison, *supra* note 5, at 1625–26.

81. For example, judges must permit juror questions of witnesses in civil cases in Florida. FLA. STAT. § 40.50(3) (2013); FLA. R. CIV. P. 1.452. In general, however, "letting jurors ask questions in criminal trials is still the exception." Morrison, *supra* note 77, at 13.

82. Mark A. Frankel, *A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 Nw. U. L. REV. 221, 224 (1990) ("Enhancement of juror satisfaction is an important component in encouraging and rewarding citizen participation in the democratic

deliberations and reasoning,⁸³ make jurors more informed decision-makers,⁸⁴ and provide other assorted benefits.⁸⁵ However, allowing jurors to ask questions deserves more in-depth analysis and advocacy in the context of responding to independent juror research, as it would counter one factor that presumably leads jurors to turn to the internet in the first place—the existence of burning questions that jurors are unable to answer through allowed channels.⁸⁶

Indeed, it is eminently reasonable to allow jurors to ask questions during the course of trial. Because both sides would hear and be able to respond to questions, what was previously an activity that would have thwarted the adversarial process (inquiry behind the closed doors of the internet) would be transformed into an activity that strengthens it (by adding to the completeness of the record on which the jury makes its decision). Although the literature arguing for allowing juror questions limits itself to endorsing juror questions of witnesses or the judge,⁸⁷ it is hard to see why jurors should not be allowed to ask questions of the parties as well.⁸⁸ Courts should expand the range of questions as much as is appropriate to maximally preempt independent juror research. Further, allowing a wider range of questions augments the protective net of negative rules and outside mechanisms: if jurors ask improper questions or questions that indicate that they have been doing outside research, courts and parties can take note, investigate, and respond accordingly.

One might wonder whether allowing jurors to ask questions is a workable response to the problem of internet research. Particular concerns arise

process. Jurors are more attentive when given the opportunity to ask questions, even if they choose not to exercise it.”).

83. B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 *IND. L.J.* 1229, 1261 (1993) (“Jurors’ questions, looked on by many lawyers and judges as an inconvenience or worse, should be viewed as welcomed opportunities to learn about jurors’ thinking and to determine whether additional or corrective action is necessary to ensure juror comprehension.” (footnote omitted)).

84. Peter B. Krupp, *When Jurors Speak: A Practical Guide to Jurors Questioning Witnesses in Massachusetts*, Bos. B.J., Sept.–Oct. 2001, at 12, 12 (“There can be little dispute that a juror, who does not understand certain terms used in a line of questions or who cannot picture the scene, will not follow or recall the line of questioning as well as a juror who does. Thus, advocates of juror questions have pointed to the salutary benefits of jurors being able to seek clarification by questioning . . .”).

85. See generally Kirsten DeBarba, Note, *Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial*, 55 *VAND. L. REV.* 1521, 1532 (2002).

86. See brad, Comment to *As Jurors Turn to Web, Mistrials Are Popping up*, N.Y. *TIMES* (Mar. 17, 2009, 2:46 PM), <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?sort=newest&offset=9> (“As someone who has sat on several juries, in each case myself and the other jurors felt frustrated by the lack of key information that would help us feel comfortable that we made the right decision. We also felt deeply frustrated at our inability to fill those gaps in our knowledge.”).

87. See, e.g., Dann, *supra* note 83.

88. “Parties” here refers to the actual parties, if they testified earlier, or, at the very least, the counsel representing the parties, where there might be constitutional concerns (such as a defendant’s right not to testify).

from a choice that courts would have to make in implementing the rule: Would jurors submit questions to the judge, who could sort and frame them as suitable questions,⁸⁹ or would jurors submit their questions directly to witnesses and parties with no oversight? Requiring jurors to submit questions to the judge raises worries about efficacy. If jurors turn to the internet because the legally proper methods of learning about a case are not forthcoming, limiting questions might push jurors back into the realm of independent research. On the other hand, the alternative approach—having jurors submit questions directly with no oversight—may lack propriety because jurors could ask prejudicial and otherwise inappropriate questions that witnesses and parties might answer. There is also the fear of juror animosity should a party object.

This threat of impropriety and prejudice should guide courts as they liberalize their rules concerning jury questions. In accordance with the practice of courts that have allowed for jury questions, the judge (and maybe the parties) should vet the questions to make sure that jurors ask only appropriate questions. To decide otherwise would undermine the foundational premises of evidence in our judicial system.⁹⁰ In response to efficacy concerns, courts need a complementary system that employs both positive and negative rules. For example, a negative rule, like detailed jury instructions that explain why some questions are inappropriate and would compromise a fair trial, will curb jurors' tendency to perform independent research if answers to questions at trial are not forthcoming.

Finally, from a broader perspective, observers must recognize that no single rule is going to be a panacea. The goal is to create a more robust system that better addresses the consequences of pervasive internet use. Allowing jurors to ask questions imposes minimal burdens,⁹¹ and one of its many benefits is that some jurors will have their questions answered, eliminating one impetus for independent research.

B. *Allowing Jurors Access to an Electronic Record*

One positive rule that would go a long way toward preventing independent juror research would be allowing jurors access to a centralized, court-maintained electronic record. Surprisingly, this has not been implemented

89. Alternatively, as is the case in Florida, the vetting process could be as follows: "Out of the presence of the jury, the judge will read the question to all counsel, allow counsel to see the written question, and give counsel an opportunity to object to the question." FLA. R. CIV. P. 1.452(c).

90. See FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: *unfair prejudice, confusing the issues*, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." (emphasis added)).

91. See Frankel, *supra* note 82, at 225 ("The only potential drawbacks [of allowing jurors to ask questions] are some added delay (approximately three minutes per question), and the possibility that jurors will engage in speculation if a question is not permitted. This latter concern may also be viewed as a positive, in that an otherwise inappropriate area of juror focus can be identified and the juror instructed that it is not a proper basis for inquiry.").

by any court or suggested in the literature. Providing access to an electronic record, like instituting PRVTTs, would be a way of using technology to combat the problems that technology itself has imposed on courts.

What exactly this record would contain or should look like is open for debate. One idea would be to have a PACER-like record available to jurors in a case,⁹² which would include the documents and motions filed, the exhibits presented, and so on.⁹³ No matter what type of electronic record courts provide, however, having information such as the testimony the jurors heard would presumably be helpful in the decisionmaking process, especially if the trial has been long and complicated. More important, and more relevant to the problem of independent juror research, this record might prevent jurors from reaching out to other sources for the information the record contains. If a juror, after a long trial, is hazy on a definition or a piece of evidence, he may go to unauthorized internet sources to get resolution, but if he had access to a record that contained the information presented at trial, his need might already be addressed.

Consequently, in determining what to include in the record, courts should consider the information that jurors are most likely to seek out. Of course, just because jurors are likely to seek out a certain sort of information does not mean that it would necessarily be a wise addition to an online record—courts should still bear in mind potential prejudice and other negative effects. On the other hand, courts should be cognizant of the threat of arbitrariness; if some juries are aware of information because some jurors independently look it up, and other juries are not because they follow the rules, the arbitrary result is reason to start providing the information on an electronic record available to all.

Even if all the information that a juror might wish to look up is not available on the record (for reasons of prejudice, for example), providing a record is nonetheless a sound idea. An electronic record would provide at least some information that a juror might otherwise look up, and thus at least incrementally reduce the need for outside research. It would also satisfy, to some degree, the impulses that drive jurors to research, such as the desire to be actively involved, to do a good job, and to be well informed.⁹⁴

One potential counterargument against providing an electronic record is that it would simply remind the juror of the information available on the internet—getting clarity on certain things presented at trial would merely give a juror more fodder to compare against unauthorized online sources. It is hard to see, however, how this would create *more* independent juror research, and it is easy to see how it would create less. Presumably, someone who would not do independent juror research before having access to an

92. "PACER" is an acronym for Public Access to Court Electronic Records, an electronic public database service that provides access to U.S. federal court documents.

93. We might even make available transcripts of the testimony of witnesses in the case. Not only would this help the jury be more informed but it may also help calibrate determinations of demeanor that the jurors made when hearing the witnesses testify. See *supra* note 53.

94. See *supra* Part III.

electronic record would not do so out of respect for the rules (or fear of the consequences), and these incentives would not change if an electronic record were available. Meanwhile, a person who would do independent juror research before having access to an electronic record might respect the rules (or fear the consequences) enough that he would heed them if they could resolve certain gaps in knowledge that an electronic record might provide.

A bigger concern may be administrative cost and technical know-how on the part of the courts, but once a system has been built, it should be easy and cost-effective to replicate. As a potential extension or adaptation of already-popular “E-filing” systems,⁹⁵ it is hard to see how making an electronic record available to the jury would be too costly or difficult for courts to realize. Such a system could be integrated alongside a general prohibition on using electronic devices in the courthouse. For example, a court could allow jurors access only to certain court computers and could even make the record available only on an intranet. Providing an electronic record thus affords a simple example of how courts could implement positive and negative rules together to facilitate a coherent and effective approach to addressing the problem of independent juror research.

CONCLUSION

Although the problem of juror research is an intractable one, a tripartite system of positive rules, negative rules, and outside mechanisms is more robust than the one that courts currently employ. This system is also more likely to mitigate the harmful influence of juror research on jury decisions. As such, it will be increasingly necessary to effectuate judicious coordination of these three elements as internet access and juror research become more common. With regard to specific negative rules, courts should institute PRVTTs to increase the effectiveness of sequestering jurors and forbidding electronic devices. As for positive rules, courts should allow jurors to ask questions of the witnesses, parties, and judge, and courts should also provide jurors with an electronic record. In combination with negative rules and outside mechanisms, such positive rules would serve to accommodate the impulses underlying juror research while containing the resultant activity in a court-controlled, adversarial environment.

95. W. Kelly Stewart & Jeffrey L. Mills, *E-Filing or E-Failure: New Risks Every Litigator Should Know*, FOR THE DEFENSE, June 2011, at 28, 28 (“[There has been] increasing use of electronic filing—indeed, sometimes mandatory use—in virtually all federal district and bankruptcy courts, many federal appellate courts, state courts and administrative agencies . . .”). See generally Alan Carlson & Tobias Hartmann, *The Cost of Not E-Filing*, 88 JUDICATURE 7, 7 (2004) (“E-filing is the process through which law firms file documents electronically with the court and serve them on participating attorneys via a secure, Internet-based system. . . . E-filing also enables parties, their attorneys, and judges to immediately access their case files via the Internet, eliminating the time-consuming process of obtaining files from the law office file system or requesting files from the court clerk.”).